

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES NIEMAN,

Defendant.

4:21-CR-3026

MEMORANDUM AND ORDER

This matter is before the Court on the Magistrate Judge's Findings and Recommendation on a Guilty Plea ([filing 9](#)) recommending that the Court accept the defendant's plea of guilty. There are no objections to the findings and recommendation. Pursuant to [28 U.S.C. § 636\(b\)\(1\)\(C\)](#) and [NECrimR 11.2\(d\)](#), the Court has conducted a de novo review of the record and adopts the findings and recommendation of the Magistrate Judge.

The Court notes that although the defendant was placed under oath, [filing 13](#) at 7, the record does not reflect that the defendant was expressly advised of "the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;" as required by [Fed. R. Crim. P. 11\(b\)\(1\)](#). But "variance from the requirements of [Rule 11] is harmless error if it does not affect substantial rights." Rule 11(h). And the omitted admonition was intended to provide notice of a potential prosecution for perjury or false statement, not to ensure the voluntariness of the plea—so, failure to give it bears only the admissibility of the defendant's answers in a later prosecution. See Rule 11 advisory committee's note to 1982 amendment; [United States v. Kriz](#), 621 F.2d 306, 311 (8th Cir. 1980). Unless and until the defendant is prosecuted for perjury or

false statement, the omission is harmless, and even then wouldn't affect the voluntariness of this plea.

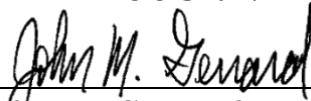
Having reviewed the record, the Court is persuaded that any omission from the Rule 11 colloquy was harmless, as it did not affect the defendant's substantial rights. The Court also notes that both parties waived any objection to the Magistrate Judge's findings and recommendation. See *Peretz v. United States*, 501 U.S. 923, 936-39 (1991).

IT IS ORDERED:

1. The Magistrate Judge's Findings and Recommendation on a Guilty Plea ([filing 9](#)) are adopted.
2. The defendant is found guilty. The plea is accepted. The Court finds that the plea of guilty is knowing, intelligent, and voluntary, and that a factual basis exists for the plea.
3. The Court defers acceptance of any plea agreement until the time of sentencing, pursuant to [Fed. R. Crim. P. 11\(c\)\(3\)](#). Unless otherwise stated at the time of sentencing, any plea agreement will be deemed accepted upon the pronouncement of the judgment and sentence.
4. This case shall proceed to sentencing.

Dated this 19th day of May, 2021.

BY THE COURT:



John M. Gerrard
Chief United States District Judge